79-913

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79

GUADALUPE H. GONZALEZ,

Petitioner,

v.

TEXAS DEPARTMENT OF HUMAN RESOURCES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CIVIL APPEALS THIRTEENTH SUPREME JUDICIAL DISTRICT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
NO. 79_____

GUADALUPE H. GONZALEZ,

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V.

TEXAS DEPARTMENT OF HUMAN RESOURCES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURTS OF CIVIL APPEALS, THIRTEENTH SUPREME JUDICIAL DISTRICT

The Petitioner, Guadalupe H. Gonzalez, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals of Texas, Thirteenth Supreme Judicial District, entered on May 3, 1979, which judgment was refused review by the Supreme Court of Texas on September 12, 1979, upon a determination that the judgment of the Court of Civil Appeals presented no error requiring reversal.

OPINIONS BELOW

The opinion of the Court of Civil Appeals is reported at 581 S.W.2d 522. That opinion and the judgment of the Court of Civil Appeals is set forth in Appendix B, infra. The judgment of the 197th Judicial District Court and the order of the Texas Supreme Court are set forth in Appendices A and C, respectively, infra.

JURISDICTION

By order entered on September 12, 1979, the Supreme Court of Texas refused Petitioner's Application for Writ of Error to review the opinion and judgment of the Texas Court of Civil Appeals. The judgment and opinion of the Texas Court of Civil Appeals entered May 3, 1979, is therefore the judgment of the highest court of Texas in which a decision could be had. The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. Section 1257(3).

QUESTIONS PRESENTED

I.

WHETHER SECTION 15.02(1)(D) OF THE TEXAS INVOLUNTARY TERMINATION OF PARENTAL RIGHTS STATUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED TO PETITIONER.

II.

WHETHER THE TERMINATION OF PETITIONER'S PARENTAL RIGHTS, ABSENT A SHOWING THAT TERMINATION WAS THE LEAST DRASTIC MEANS OF PROTECTING HER CHILDREN, CONSTITUTED AN IMPERMISSIBLE INTRUSION UPON PETITIONER'S RELATIONSHIP WITH HER CHILDREN.

STATUTE INVOLVED

Section 15.02, Tex.Fam.Code Ann., (Supp. 1979, provides in relevant part:

> A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the Court finds:
>
> (1) the parent has:
>
> * * *
>
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child,...
>
> * * *
>
> and
>
> (2) termination is in the best interest of the child,...
>
> * * *

The statute is set out in its entirety in Appendix D, infra.

STATEMENT OF THE CASE

On August 16, 1978, the State of Texas officially decreed that Mrs. Guadalupe H. Gonzalez was no longer the mother of five of her nine children. Seven of Petitioner Gonzalez' children, then aged one to fourteen years, had been seized by State officers on April 15, 1976, and scattered among several foster homes. The State accused the Petitioner of neglecting her children.

Over Petitioner's vigorous objections, a jury in the 197th District Court of Cameron County, Texas, found that she had neglected her children in the circumstances condemned by Section 15.02(1)(D) of the Texas Family Code and that termination of the family relationship was in the "best interest" of her five youngest children. The strongest evidence in support of the verdict showed that the children were frequently at home alone or in the care of their godmother, that the home was not kept very clean, that the utilities had been terminated for nonpayment, that the children on occasion wore dirty clothes, that the Petitioner had "consorted" with men who had physically abused her, and that the children had lice,

two were underdeveloped, while one also had internal parasites and secondarily infected scabies sores. None of the acts of neglect had occurred more recently than twenty-seven months prior to the trial.

Petitioner's trial pleadings raised objections that the grounds pled for termination were unconstitutionally vague and that termination was not the least drastic means available to adequately protect her children. The trial court overruled Petitioner's objections to the special jury issues and motion for judgment notwithstanding the verdict, each of which encompassed her vagueness challenge as well as her objection that it was not shown that termination was necessary to protect her children.

The Court of Civil Appeals rejected the vagueness challenge and overruled without comment the "least drastic means" point of error, [1] although the State had conceded the legal theory of that point of error.

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1 By her Point of Error No. 7, Petitioner contended: The trial court erred in denying Respondent's Motion for Judgment Notwithstanding the Verdict, as there was no sufficient evidence that no other, less drastic, alternatives to termination existed.

Petitioner raised the same assignments of error on application for writ of error to the Texas Supreme Court, which refused review on a finding of no reversible error.

The children have remained in foster care pending this appeal.

REASONS FOR GRANTING THE WRIT

Dependency and termination proceedings are the vehicle through which the state, acting in its capacity as parens patriae, protects minor children from parental abuse and neglect. The statutes which authorize these proceedings have received little scrutiny from this Court, although contemporary scholars uniformly decry their vague language and overreaching character. [2] The Texas termination of parental rights statu-

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2. See Wald, "State Intervention on Behalf of 'Neglected' Children: A Search for Realistic Standards," 27 Stanford L.Rev. 985 (1975); Wald, "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children

tute is typical of these statutes.

I. SECTION 15.02(1)(D) OF THE TEXAS INVOLUNTARY TERMINATION OF PARENTAL RIGHTS STATUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED TO PETITIONER.

Texas provides that parental rights may be terminated if the parent has "knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child." Most state statutes define neglect and grounds for termination in similarly imprecise language, [3] and the result has been widespread confusion and inconsistency in their enforcement and application. Professor Wald, who has extensi-

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in Foster Care, and Termination of Parental Rights," 28 Stanford L.Rev. 623 (1976); Note: "State Intrusion Into Family Affairs: Justifications and Limitations," 26 Stanford L.Rev. 1383 (1974); and, Goldstein, Freud and Solnit, Beyond the Best Interests of the Child, 1973). See, generally, Goldstein, "Medical Care for the Child at Risk, On State Supervention of Parental Autonomy," 86 Yale L.J. 645 (1977).

3. Id.

vely analyzed this problem, characterizes termination of parental rights as a "haphazard process," [4] ultimately dependent upon the personal values of social workers and judges.

Thus, in Oregon, South Dakota, and Maryland the parent-child relationship may be extinguished based on statutory language similar to the statutes struck down by courts in Arkansas, Iowa and Alabama. [5] It is not uncommon to find courts resisting vagueness challenges to these laws based upon concern that greater specificity will

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4 Wald, supra, 28 Stanford at 688-699, at n.2.

5 See State v. McMasters, 259 Or. 291 486 P.2d 567 (1971); In re D.T., 237 N.W.2d 166 (S.D.Sup. 1975); and, In re Cager, 251 Md. 473, 248 A.2d 384 (1968) which upheld the constitutionality of the statutory language challenged for vagueness. Compare to Alsager v. District Court of Polk County, Iowa, 406 F. Supp.10 (S.D. Iowa 1975) aff'd 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F.Supp. 769 (M.D.Ala. 1976); and Davis v. Smith, 583 S.W.2d 37 (Ark.Sup. 1979) which held that language substantially similar to that involved in the above cited cases was unconstitutionally vague.

sacrifice needed flexibility, [6] which is traditionally regarded as essential when determining what is "best" for children. This judicial insistence upon the freedom to act to protect children has sanctioned laws which, for lack of even remotely objective standards, threaten every parent-child relationship.

Failure to provide explicit standards results in an absence of fair warning to parents of what conduct is prohibited, encourages arbitrary and discriminatory enforcement, and inhibits the parents' legitimate exercise of their freedom to raise their children. See Grayned v. City of Rockford, 408 U.S.104, 108-109 (1972). Therefore, persons of common intelligence must necessarily guess at the meaning of such laws and differ as to their application. Connally v. General Construction Co, 269 U.S. 385 (1926).

These conditions inhere in the Texas statute as well. It fails to provide objective, ascertainable standards by which to measure childrearing practices; nor does it specify

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6 See, e.g., State v. McMasters, supra., at n.5.

which needs and interests of the children are sought to be protected, or the types and degree of harm which justify the sanctions of the statute. The Texas courts have failed to provide a narrowing construction.[7] Without statutory standards or judicial guidelines, the value judgments of caseworkers, judges and juries regarding what are proper and improper childrearing practices become the decisive factor.

The Texas provision has been defended as

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7. Although faced with numerous opportunities, the Texas courts in prior termination cases have failed to cure the vagueness defects of §15.02(1)(D) through narrowing construction of the statute. The rule of law expressed, if any, is in general terms and the decisions turn on the specific facts of each case. See, e.g., Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745 (Tex.Civ. App.--Dallas 1976, no writ); In the Matter of R.E.W., 545 S.W.2d 573 (Tex. Civ.App.--Houston [1st Dist.] 1977, writ ref'd n.r.e.); and, D.F. v. State, 525 S.W.2d 933 (Tex.Civ.App.--Houston [1st Dist.] 1975, no writ).
In addition, the Texas Court of Civil Appeals in this case made no attempt to restrict the scope of the statute or to cure the vagueness defects of the statute by a narrowing construction.

the best effort of the Texas legislature because there would be "extreme difficulty in being more specific. . ."[8] Yet commentators believe that it is both possible and desirable to make termination laws more specific, and have suggested model standards and statutes which, at a minimum, demonstrate that such laws can be made definite.[9] Laws containing more precise standards "do not prevent judges from examining each situation on its own facts in order to determine the appropriate disposition; rather they more clearly define for the judge the kinds of harm with which society is concerned."[10]

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8 Sanchez v. Texas Dept. of Human Resources 581, S.W.2d 260, 267 (Tex.Civ.App.--Corpus Christi, 1979, no writ).

9 Wald, supra; Goldstein, Freud and Solnit, supra; and, Note: "State Intrusion Into Family Affairs," supra, at n.2. See, generally, Boskey and McCue,"Alternative Standards for the Termination of Parental Rights," 9 Seton Hall L.Rev.1, 35-46 (1978).

10 Wald, supra, 27 Stanford L.Rev. at 1003-1004, at n.2.

The importance of the parental right of personal choice in directing the rearing of their children, Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Zablocki v. Redhail, 434 U.S. 374 (1978); Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977); Ginsberg v. State of New York, 390 U.S. 629 (1968), requires unambiguous statutory criteria for defining the circumstances in which others may substitute their own personal views regarding childraising. By examining Section 15.02(1)(D) for vagueness, this Court can thereby provide needed guidance to all jurisdictions of the minimum due process requirements of termination legislation.

II. THE TERMINATION OF PETITIONER'S PARENTAL RIGHTS, ABSENT A SHOWING THAT TERMINATION WAS THE LEAST DRASTIC MEANS OF PROTECTING HER CHILDREN, CONSTITUTED AN IMPERMISSIBLE INTRUSION UPON PETITIONER'S RELATIONSHIP WITH HER CHILDREN.

At stake in termination proceedings is the very existence of the family. In asserting its right and duty to safeguard the welfare of children, the State seeks total

destruction of the family unit. The irrevocable nature of termination makes it the family law equivalent of capital punishment --the life of the family is thereby extinguished. The importance of the family relationship requires that the State bear a heavy burden to justify the necessity of terminating that relationship.

A. A PARENT HAS A FUNDAMENTAL INTEREST IN PRESERVING HER RELATIONSHIP WITH HER CHILDREN.

Like the marriage relationship, the relationship between parents and their children is at the heart of traditional family life. In addition to biological bonds, a parent who has raised her children shares with them emotional attachments, values, loyalties, traditions and expectations. It is these bonds which give each family, and the individuals who comprise the family, the unique characteristics which set it apart from all other families. America has traditionally protected and cherished the diversity of its citizenry, which in turn depends upon differences between families. When a family relationship is ended by those who would substitute their

own judgments of what is "best", the unique characteristics of that family are thereby condemned and society suffers a dilution of its diversity.

This Court has long been solicitous of the relationship between parents and their children. Meyer v. Nebraska, 262 U.S. 390 (1923). Although not explicitly stating that the interest created by the parent-child relationship is "fundamental," numerous decisions of this Court have recognized the special importance of this right and have subjected substantial state intrusions upon family relationships to the exacting scrutiny required when "fundamental rights" are at stake.

In Trimble v. Gordon, 430 U.S. 762, 769 (1977), the Court referred to the family unit as "perhaps the most fundamental social institution of our society." And in Stanley v. Illinois, 405 U.S. 645, 651 (1972), it was observed:

> The Court has frequently emphasized the importance of the family. The rights to conceive and raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more

> precious ...than property rights" (citations omitted). . . .The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment (citations omitted).

The right of privacy encompasses only those personal rights which are deemed "fundamental" or "implicit in the concept of ordered liberty." Roe v. Wade, 410 U.S. 113 (1973). In Roe v. Wade, the Court made a statement which it has frequently repeated:

> While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to . . .family relationships . . . (citations omitted). Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Services International, 431 U.S. 678 (1977).

Where the State has sought to significantly intrude upon family relationships, the Court has required that the intrusion be both justified by a compelling state

interest and limited to only the extent necessary to accomplish the state interest. Moore v. City of East Cleveland,Ohio, 431 U.S. 494 (1977); Roe v. Wade, supra. In Stanley v. Illinois, supra, at 651, with regard to a parent's interest in children he had sired and raised, the Court held that the parent's interest "undeniably warrants deference and, absent a powerful countervailing interest, protection."

The relationship existing between parents and their children is so rooted in the conscience and traditions of our nation as to be ranked as fundamental.

B. IN TERMINATING THE PARENT-CHILD RELATIONSHIP, THE STATE FAILED TO JUSTIFY THE EXTENT OF ITS INTRUSION UPON THAT RELATIONSHIP.

By completely severing Petitioner's ties with her children, the State sought to protect the children by means having the maximum destructive impact upon her family unit.

Because the State has the right and duty to protect children from the consequences of parental neglect, Stanley v. Illinois, supra, it must be free to seek termination

of the family relationship in those instances where parents refuse to correct the conduct or conditions which endanger their children. But a growing number of state courts have recognized that the fundamental nature of the family relationship requires strong protection, and have consequently required the State to justify the necessity for ending that relationship. Other alternatives must be explored and eliminated, with meaningful State assistance provided to the neglectful parent to help her remedy the situation.[11] The inquiry becomes whether termination of the relationship is necessary to adequately protect the children "in the light of less drastic means for achieving the same purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

Texas does not inquire whether termination is necessary to protect the children,

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11 State v. Robert H, 393 A.2d 1387 (N.H. Sup. 1978); In re People inInterest of M.M., 520 P.2d 128 (Colo. Sup. 1974); In re B.G., 523 P.2d 244 (Cal. Sup. 1974); In re N.H., 373 A.2d 851 (Vt. Sup.1977); Matter of S.D., Jr., 549 P.2d 1190 (Alk. Sup. 1976); Interest of Walter B., 577 P.2d 119 (Utah Sup. 1978).

but only whether termination is in their best interest.[12] It may, at the same time, be in their interest to continue the relationship while returning all or some of the children to the family home for progressively longer visits under State supervision, or any of a reasonable number of other alternatives,[13] but the Texas termination statute does not authorize the jury to recommend such intermediate solutions. As a result, the State makes no effort to demonstrate the inadequacy of other means of protecting the children.[14]

The State took possession of Petitioner's children nearly two and one half years prior to trial and scattered them into separate

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12 The statute is set out in its entirety in Appendix D, infra.

13 See, Roe v. Conn, 417 F.Supp. 769, 779 (M.D. Ala., 1976).

14 State objections, on grounds of relevancy, to Petitioner's efforts to elicit testimony regarding other alternatives were sustained by the trial judge. The Court of Civil Appeals agreed that such evidence was irrelavant. Appendix B, pp. 27-31, infra.

foster placements. She was permitted regular visitation, but the State refused to return any of the children to her home on even a trial basis. The evidence was undisputed that she substantially complied with each instruction given to her by the State,[15] yet she was denied the opportunity to demonstrate that she had learned her lesson and could care for her children without endangering their welfare.[16]

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15 During the pendency of the suit, assistance provided Petitioner by the State consisted largely of referrals for legal assistance, employment and income based upon disability. Petitioner underwent psychological and neurological examinations and attended Red Cross Health in Home classes at the request of the State.

16 This case presents a graphic illustration of the situation referred to in the Commentary to the A.B.A. INSTITUTE OF JUDICIAL ADMINISTRATION, JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO ABUSE AND NEGLECT (1977):

> Too often under current practice, there is no direction or incentive for parents or agency to work towards the return of the child... Dealing with the parents may be time-consuming and, according to the agency's priorities, unproductive...Therefore, no effort is made to work towards return.

Given the fundamental interests at stake, it was uncumbent upon the State to demonstrate that the children could not be adequately protected by means less drastic than termination of the parent-child relationship. Because the State failed to make such a showing, and because the Texas termination statute does not require that such a showing be made, the state action constituted an impermissibly extreme intrusion upon the integrity of Petitioner's family unit.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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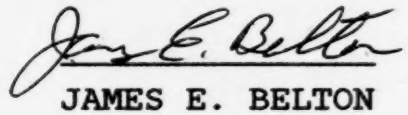
CERTIFICATE OF SERVICE

I, James E. Belton, do hereby certify that I mailed (3) true and correct copies of the foregoing Petition for Writ of Certiorari, with first-class postage prepaid, addressed to Selden N. Snedeker, Criminal District Attorney and Thomas Sullivan, Assistant Criminal District Attorney, Attorneys of Record for Respondent, Cameron County Hall of Justice, 974 E. Harrison, Brownsville, Texas 78520; and, E. Dale Robertson, Attorney Ad Litem for the children, 950 E. Van Buren, Brownsville, Texas 78520, on this 10th day of December, 1979.



JAMES E. BELTON

APPENDIX

APPENDIX A

NO. 3076-N-T

IN THE INTEREST	)	IN THE DISTRICT
OF JOHN HEATH,	)	COURT
MARTHA HEATH,	)	
TOMAS GONZALEZ, JR.	)	CAMERON COUNTY,
ROBERTO G. DE LEON	)	TEXAS
ZULEMA DE LEON	)	
AND MARIA G. DE	)	197TH JUDICIAL
LEON, MINOR	)	DISTRICT
CHILDREN	)	SITTING AS A
	)	JUVENILE COURT

FINAL JUDGMENT

BE IT REMEMBERED that on the 31st day of July, 1978, came on to be heard the above entitled and numbered cause. The Petitioner, Texas Department of Human Resources, appeared through its appointed representative, Remberto Arteaga, and by and through its attorneys of record, Thomas Sullivan and Reynaldo S. Cantu, Assistant District Attorneys for Cameron County, Texas. The Respondent, Maria Guadalupe Heath Gonzalez appeared in person and by through her attorneys of record, James E.

Belton and Susan Williams of Texas Rural Legal Aid, Inc. E. Dale Robertson, Attorney Ad Litem, represented the interest of all the children.

The Respondent, Tomas Gonzalez, Sr., executed an affidavit of Relinquishment of Parental Rights, and an Affidavit of Waiver of Interest in the child, Tomas Gonzalez, Jr., he likewise waived citation and service of process. Tomas Gonzalez, Sr., failed to appear and wholly defaulted. The Respondent, Leonzo de Leon, although duly notified and cited, failed to appear and wholly defaulted. Rolando Heath, the father of John Heath, Martha Heath and Albert Heath was deceased in 1967.

All parties announced ready for trial by their respective attorneys of record. A jury of twelve good and lawful men and women was selcted, impaneled and sworn. The evidence was presented and concluded. Following the submission of the Court's final charge and the arguments of counsel, the jury reached its verdict which was returned into open court, having been duly signed by the foreman, Jose R. Salinas, and duly received and ordered filed by the court without objection by counsel, which

charge of the court and the answers of the jury to the special issues submitted to by the Court are by reference, incorporated herein for all purposes as fully and completely as if the same were here set forth verbatim.

It appeared to the Court that Tomas Gonzalez, Sr., executed an Affidavit of Waiver of Interest and Relinquishment of Parental Rights in the child, Tomas Gonzalez, Jr., and further that he failed to provide support for said child, according to his ability for more than a year ending within six months of the date of filing of this suit. It further appeared that termination of the parent-child relationship between Tomas Gonzalez, Sr., and Tomas Gonzalez, Jr., is in the best interest of the child.

It appeared to the Court that there exists neither in fact nor in law a parent-child relationship between Leonzo de Leon and the children, Robert G. de Leon, Zulema G. de Leon and Maria Guadalupe de Leon. It further appeared to the Court that termination of the parent-child relationship, if any, between Leonzo de Leon and the children above named would be

in the best interest of the children.

It appeared to the Court that, by agreement of all parties, filed herein, termination of the parent-child relationship between Maria Guadalupe Heath Gonzalez, and the minor children, John Heath and Martha Heath is not sought. The Court is of the opinion that said agreement is in the best interest of John Heath and Martha Heath, and should be approved.

It appeared that Maria Guadalupe Heath Gonzalez had knowingly placed the children in conditions and surroundings which endangered their physical well being and that Maria Guadalupe Heath Gonzalez had knowingly allowed the children to remain in conditions or surroundings which endangered their physical well being. It further appeared that termination of the parent-child relationship between Maria Guadalupe Heath Gonzalez and the minor children, Albert Heath, Tomas Gonzalez, Jr., Roberto G. de Leon, Zulema G. de Leon and Maria Guadalupe de Leon would be in the best interest of the children.

It appears to the Court that the Attorney Ad Litem spent 23.1 hours in the discharge of his duties and should be com-

pensated accordingly.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that:

1. The parent-child relationship between Tomas Gonzalez, Sr., and the minor child Tomas Gonzalez, Jr., be and is hereby terminated except that the child retain the right to inherit from and through its divested parent.
2. The parent-child relationship, if any, between Leonzo de Leon and the minor children, Robert G. de Leon, Zulema de Leon, and Maria Guadalupe de Leon, be and is hereby terminated except that the children retain the right to inherit from and through their divested parent.
3. The parent-child relationship between Maria Guadalupe Heath Gonzalez and the minor children, Albert Heath, Tomas Gonzalez, Jr., Robert G. de Leon, Zulema de Leon and Maria Guadalupe be and is hereby terminated except that the minor children retain the right to inherit from and through their divested parent.

4. Texas Department of Department of Human Resources, Cameron County Child Welfare Unit, Remberto Arteaga, Supervisor, and his successors in office, be and is hereby named Managing Conservator of John Heath and Martha Heath.
5. The Managing Conservator of John Heath and Martha Heath has all the rights duties and obligations as enumerated in Article 14.02 of the Texas Family Code except the right to consent to adoption.
6. The Texas Department of Human-Resources, Cameron County Child Welfare Unit, Remberto Arteaga, Supervisor, and his successors in office, be and is hereby named Managing Conservator of Albert Heath, Tomas Gonzalez, Jr., Roberto G. de Leon, Zulema G. de Leon and Maria Guadalupe de Leon.
7. The Managing Conservator of Albert Heath, Tomas Gonzalez, Jr., Roberto G. de Leon, Zulema de Leon, and Maria Guadalupe de Leon be granted all the rights, duties and obligations as enumerated in Article

14.02 of Texas Family Code including the right to consent to the adoption of the children named herein.
8. The Attorney Ad Litem be compensated in the amount of $575.00 and that said amount be taxed as costs.
9. The costs of this suit be assessed against the Petitioner.

SIGNED FOR ENTRY on the 16th day of August, 1979.

DARRELL HESTER
PRESIDING JUDGE

APPENDIX B

OPINION OF THE TEXAS COURT OF CIVIL APPEALS

NUMBER 1428

IN THE COURT OF CIVIL APPEALS

FOR THE THIRTEENTH JUDICIAL DISTRICT OF

TEXAS

SITTING AT CORPUS CHRISTI, TEXAS

* * * * * * * * * * * * * * * * * *

GUADALUPE H. GONZALEZ,

Appellant,

V.

TEXAS DEPARTMENT OF HUMAN RESOURCES,

Appellee.

* * * * * * * * * * *

On appeal from the 197th District Court of Cameron County.

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O P I N I O N

Suit was brought by the Cameron County Child Welfare Unit of the Texas Department of Human Resources (State) to terminate the parent-child relationship between Appellant Guadalupe H. Gonzalez, the natural mother, Tomas Gomzalez, the natural mother, Tomas Gonzalez and Leonzo de Leon, the living natural fathers, and seven of nine children: John Heath (born February 23, 1963), Martha Heath (born April 3, 1965), Albert Heath (born December 16, 1966), Tomas Gonzalez, Jr., (born January 24, 1970), Robert De Leon (born June 3, 1972), Zulema de Leon (born May 5, 1973), and Maria de Leon (born June 4, 1974).

[1] Rolando Heath, father of the children surnamed Heath, died in 1967. Tomas Gonzalez, Sr., one of the natural fathers, excuted an affidavit relinquishing his parental rights to his child, Tomas Gonzalez, Jr. Leonzo de Leon, the natural father of the children with the same surname, are the result of a meretricious relationship with the Appellant. De Leon although duly served with service of pro-

The State based its suit on Section 15.02 (1)(D) and (2) of the Texas Family Code Ann. (Supp. 1979) which provides that:

> "A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the Court finds that:
> (1) the parent has:
> * * *
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child, . .
> * * *
> and...
> (2) termination is in the best interest of the child."

Appellant answered by filing a general denial, numerous special exceptions and the following two "affirmative defenses": (1) that there were available less drastic alternatives to termination and that the State had failed to adequately provide her and her children the welfare, protective and supportive services which would assist

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cess and notification of the hearing, failed to appear. Neither father appeals from the trial court's order terminating his parental rights.

her in maintaining and strengthening her family life; and 2) that although she lacked a formal education, had limited financial and economic resources, and was suffering from physical and emotional problems, she had never willfully denied her children the care they needed nor had she intentionally endangered their well-being.

In response to numerous special issues, the jury found: 1) that Appellant had knowingly placed each child in conditions or surroundings which endangered his/her physical well-being; 2) that Appellant had knowingly allowed each child to remain in conditions or surroundings which endangered his/her physical well-being; 3) that termination of the parent-child relationship is in the best interest of each child; 4) that the appointment of the State as managing conservator would be in the best interest of each child.

After the jury verdict, the parties, with the consent of the trial court, entered into an agreement whereby the State agreed not to seek termination of the parent-child relationship between Appellant and the two oldest minor children, John

Heath, age 16, and Martha Heath, age 15. Based upon this agreement and the answers to the special issues, the trial court entered a judgment which terminated the parent-child relationship of Appellant and both living natural fathers as to the five youngest children, Albert Heath, Tomas Gonzalez, Jr., Robert de Leon, Zulema de Leon, and Maria de Leon. The court appointed the State as managing conservator of these children. The children have remained in foster homes during the course of this appeal.

Appellant brings forward nine points of error for our consideration. We consider Appellant's complaints concerning the trial court's action in overruling her special exceptions to the pleadings and in refusing to submit to the jury her tendered special instruction, before we address her legal and factual sufficiency points of error attacking the jury's finding and her other constitutional complaints.

In point of error number two, Appellant complaints that the district court abused its discretion in overruling special exceptions to the State's original petition because such petition did not allege facts

in support of the grounds for termination of the parent-child relationship, thereby depriving her of fair notice of what the State expected to prove and what she had to defend. In point of error number three, Appellant, in a related argument, complaint that the application to this case of Section 11.08 of the Texas Family Code resulted in an unconstitutional denial of Appellant's procedural due process of law. These contentions are without merit.

Section 11.08 requires, among other things, that a petition which seeks termination of the parent-child relationship must include "a statement describing what action the court is requested to make concerning the child and the statutory grounds on which the request is made." Tex.Fam. Code Ann. §11.08(b) (10) (1972). Section 11.14(a) provides that the rules of civil cases generally shall be applicable. Tex.Fam.Code Ann. §11.14(a) (1972). Rule 45, T.R.C.P., provides, in relevant part, as follows:

"Pleadings in the district court and county courts shall. . .

(b) Consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's ground of

defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to plaintiff is given by the allegations as a whole. (Emphasis added).

This rule is consistent with the due process notice requirements outlined by the Supreme Court in In Re Gault, 387 U.S. 1, 33 (1967).

Here the State filed an original petition in which the State sought to be appointed the managing conservator of Appellant's children. Later the State filed a pleading captioned "Original Petition for Temporary and Permanent Managing Conservatorship and to Terminate the Parent-Child Relationship." In support of each petition, the State alleged the statutory grounds contained in Section 15.02(1)(D) and (2) of the Texas Family Code as the basis for termination of the parent-child relationship. In addition, the State alleged that:

> ". . . temporary and permanent court orders for the care and protection of the children are necessary for the reasons set forth in the affidavit attached . . ."

The affidavit by Remberto G. Arteaga, Supervisor for the Cameron County Child Welfare Unit stated, in relevant part:

> "The children, if required to return to their natural mother, GUADALUPE GONZALEZ, would suffer immediate and irreparable injury for which there is no adequate remedy at law and that their mother is an alcoholic, unemployed and would be unable to provide (1) decent, safe and sanitary housing, (2) adequate parental care and supervision, (3) proper nutritional meals for the children. Therefore, for the safety and welfare of the children, the children should not be permitted to return to their mother, and, in my opinion it would be in the best interest of the children if they were allowed to remain in their present foster homes pending a hearing..."

In addition, the State filed a show cause motion which alleged that the statutory grounds which initially supported the State's removal of the children were continuing and that, therefore, the State should continue as managing conservator because:

> "1. Respondent has no visible means of support;
> 2. Respondent has failed to stabilize her home environment, in that, she

continues to consort with men who physically abuse her;

3. She continues to deny that any problems existed in the past with respect to the way that she cared for and supervised her children."

Several months later, the Appellant filed an answer which included special exceptions directed toward the allegations contained in the State's pleadings on the basis that such allegations were "vague and general and consist of conclusions of law and do not state the family conditions and circumstances and the specific facts, dates, names and places which support Petitioner's conclusions of law." The trial court overruled Appellant's special exceptions. Contrary to Appellant's assertions, the State did allege more than the statutory grounds for termination as contained in Sections 15.02(1)(D) and (2) of the Texas Family Code. We note that during oral argument, both parties stated that the discovery process under our rules had been utilized. Appellant's points of error numbers two and three are overruled.

By her points of error numbers four and

five, Appellant complains: 1) that there is insufficient evidence to show that there exists a present danger to the physical well-being of the children; and 2) that the trial court abused its discretion in refusing to submit the following special instruction requested by Appellant;

> "In connection with the Special Issues, you are instructed that termination may not be based solely upon conditions which existed in the past but no longer exist. Before termination of the parent-child relationship can be ordered, it must be shown that the grounds upon which termination is being sought presently exist."

The trial judge refused to submit the special instruction. Appellant moved for a directed verdict and a judgment notwithstanding the verdict on the basis that there was insufficient evidence to show that there existed a present danger to the physical well-being of the children. These motions were overruled.

Rule 277, Texas Rules of Civil Procedure, requires the Court to "submit such explanatory instructions and definitions as shall be proper . . ." An instruction is "proper" if it finds support in the evidence and the inferences to be

drawn therefrom, and if it might be of some aid or assistance to the jury in answering the issues submitted. First State Bank & Trust Co. of Edinburg v. George, 519 S.W.2d 198 (Tex.Civ.App.- Corpus Christi 1974, writ ref'd n.r.e.); Mejia v. Liberty Mutual Ins. Co., 544 S.W.2d 690 (Tex.Civ. App.- Houston [14th Dist.] 1976, no writ). The trial court has considerable discretion in deciding what instructions are necessary and proper in submitting issues to the jury. We do not find that the trial judge abused his discretion in this regard. See Spradling v. Williams, 533 S.W.2d 143, 145, (Tex.Civ.App.- Beaumont 1977), aff'd 566 S.W.2d 561 (Tex.Sup.1978); McCane Sondock Detective Agency v. Penland Distributors, Inc., 523 S.W.2d 62 (Tex.Civ.App.-Houston [14th Dist.] 1975, no writ); First State Bank & Trust Co. v of Edinburg v. George, 519 S.W.2d 198 (Tex.Civ.App.-Corpus Christi 1974, writ ref'd n.r.e.).

Appellant's only specific objection to the court's charge was to the effect that the special issues (because they merely "tracked" the vague, overbroad, etc., language of the statutory grounds for termination), violated Appellant's constitutional rights in several respects. Other com-

plaints concerning the form of the special issues as submitted were waived. Allen v. American National Ins. Co., 380 S.W.2d 604 (Tex.Sup. 1964); Texas Employers Ins. Ass'n v. Nueman, 379 S.W.2d 295 (Tex.Sup. 1964). The issues, as submitted to the jury, did require the jury to make a judgment as to the present conditions of Appellant and of the children. For example:

> "Do you find, from a preponderance of the evidence, that termination is in the best interest of the children, or any of them." (Emphasis added).

The special issues directed the jurors' attention to the ultimate issues of the case. Appellant's points of error numbers four and five are overruled.

In point of error number eight, Appellant brings forward a "legal sufficiency" point as to the jury findings relating to the three youngest children by complaining that the trial court erred in entering a judgment which terminated the parent-child relationship between her and Robert, Zulema and Maria because there is "no evidence" to support a finding that Appellant either knowingly placed or knowingly allowed these

three youngest children to remain in conditions or surroundings which endangered their physical well-being. In point of error number nine, Appellant complains of the jury's findings as to all five children on "factual sufficiency" grounds.

At the outset we recognize that actions which break the ties between a parent and child "can never be justified without the most solid and substantial reasons." State v. Deaton, 54 S.W.901 (Tex.Sup.1900). First, there is the strong presumption that a child's foremost interest is usually best served by keeping custody in and with the natural parents. This is based on a logical belief that the ties of the natural relationship of parent and child ordinarily bring about strong assurances and genuine efforts on the part of the custodians to provide the child with the best of care and most beneficial opportunities possible. Usually, the best atmosphere for mental, moral and emotional development of the child is with its natural parent. Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex.Sup. 1976), citing Mumma v. Aguirre, 364 S.W.2d 220 (Tex.Sup. 1963). See and compare: Sanchez v.Texas Department of

Human Resources,___ S.W.2d __ (Tex.Civ.App. -Corpus Christi 1979, no writ).

The standard of our review of legal and factual sufficiency points of error which attack the findings made by the trial judge or jury in an involuntary termination proceeding pursuant to the Texas Family Code is governed by the same general rules applicable to other civil cases. See e.g., Woodard v. Texas Dept. of Human Resources, 573 S.W.2d 596 (Tex.Civ.App.-Amarillo 1978, writ ref'd n.r.e.); In Re E. S. M., 550 S.W.2d 749, 752 (Tex.Civ.App. -Houston [1st Dist.] 1977, writ ref'd n.r.e.). Thus, in deciding the "legal sufficiency" point, we review the evidence only in the light most favorable to support the jury's findings, and in deciding the "factual sufficiency" point, we must consider all of the evidence. See Garza v. Alviar, 395 S.W.2d 821 (Tex. Sup.1965); In Re King's Estate, 244 S.W.2d 660 Tex.Sup.1951); In Re E. S. M., 550 S.W.2d 749 (Tex.Civ.App.-Houston [1st Dist.] 1977, writ ref'd n.r.e.). First, we consider the legal sufficiency point. Frank DeGeer, a child welfare worker for the State, testified that he had been assigned to the Gonzalez case for approximately a two-year

period which commenced in May, 1975, after the State had received complaints that Appellant had been leaving her children at home alone. During this period of time, he stated that he made 18 to 20 visits to Appellant's home. On the date of the first home visit in 1975, DeGeer stated that he found, alone and without adult supervision, the school-aged children, Richard Roy,[2] Martha, Albert and "another eight year old" who "might have been Tomas." DeGeer stated that a telephone call from a neighbor who "was concerned because just one of the children was there alone" prompted further home visits. Later, he made a visit to the school attended by the school-age children to talk with the school nurse. He stated that "a home visit was made that same day and the children were alone." Appellant was not present at her home the following day either. On this day, DeGeer discovered

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[2] The State dismissed the termination suit as to Richard Roy prior to trial.

that the children were with a neighbor, Mrs. Guerrero, who was the godmother of the Appellants children surnamed Heath. Appellant had not made prior arrangements with Mrs. Guerrero to have her look after the children. DeGeer found it necessary to take one of the older children with him back to the Gonzalez home in order to obtain clean clothing for the youngsters. DeGeer testified that, while he was in Appellant's home, he noticed that the toilet could not be flushed without using a bucket of water; the electricity and gas were turned off; there was no food in the pantry or closets; the house was in a filthy and unkept manner; and the refrigerator had no food--"Just a few cockroaches."

In March DeGeer testified that he found John home alone. John told him that he was not in school because he didn't have any shoes. DeGeer stated that he took John to school where he obtained shoes for him from the nurse's office. During the time he was in the nurse's office, DeGeer stated that Albert, John's brother, was brought into the office because he was crying and disturbing the rest of the children.

DeGeer further testified that, quite by coincidence, another brother, Tomas was also brought into the office a short time later because he was being sullen and uncooperative in the classroom. Tomas refused to talk with anyone present. The next day DeGeer stated that he and Remberto Arteaga, the present welfare supervisor, made a visit to the Gonzalez home during school hours. They discovered that no one was at home and the door was not locked. DeGeer stated that an inspection revealed the absence of food and no utilities in the home. In April, he made another visit to the Gonzalez home in response to a complaint by Mrs. Guerrero, and found John again at home alone.

Olivia Guerrero testified that she was the godmother of Richard Roy, John, Mary and Martha and that she had known Appellant only through the children for the past six years. She stated that when she initially knew the children, they would come over to her home and visit. The visits became more and more frequent. By the end of the six-year period, they were coming to her home almost every day, sometimes staying two or three days in a row. Guerrero

stated that Appellant had requested her to babysit with the children on only one occasion, and that was the night before the children were taken from the Appellant. When the children came to visit, she stated that they usually did not bring any clean clothes or food and were generally dirty. When the children came to her home, they usually only told her that their mother was not at home; that she was either with Mr. de Leon or that they did not know where she was.

DeGeer made a visit to the Guerrero home at Mrs. Guerrero's request. Two school age children, Albert and Tomas, and the three pre-school children, Robert, Zulema and Maria, were there. Mrs. Guerrero explained that the Appellant had requested her to take care of the children the previous night, promising to return the following day by 8:00 a.m. so that Mrs. Guerrero could go to work. She called because there was no one else to supervise the children. DeGeer stated that the children appeared as though they had not bathed for quite some time, their clothes were dirty and "they were lice-ridden". DeGeer stated that he went to the Gonzalez home to obtain some

clean clothing for the children. Upon his arrival, he found that the house was unlocked, that the utilities were still off, and that there was no food in the house. DeGeer testified that the children never seemed to known where their mother was when he asked about her absence. He stated that during the time he was working with the family, the housing condition deteriorated,became more unsanitary and the house sometimes smelled of urine.

Dr. Antonio Diaz, a specialist in family medicine, testified that he examined Albert who was then 9 years old. Diaz stated that Albert weighed fifty pounds, which placed his weight at only the third to fifth percentile of children his age (i.e., 95 to 97% of children nine years of age weigh more than 50 pounds), and his height was only at the tenth percentile. Diaz further stated that Albert was uncommunicative. His examination revealed that Albert had lice and showed signs of "failure to thrive." Dr. Diaz stated that his last visit with Albert was after Albert had been placed in foster care. He described the child's progress as far as his weight, health and emotional state to be good.

Dr. Diaz testified that when he examined Tomas, a six (6) year old boy, he found that Tomas was suffering from scabies, a parasite that burrows under the skin. He testified that the scabies had created sores on Tomas' body which had become secondarily infected. He further found Tomas to be infected with lice and internal parasites. Tomas' weight (42 pounds) was at the 40th percentile for children his age, while his height (44 inches) was only at the 7th to 10th percentile. Dr. Diaz stated that the medical condition of the children was consistent with a history of parental neglect. The evidence in the record showed that all of the children suffered from lice.

Dr. Michael de Socorrez, who holds a Ph.D. in psychology, testified that the Appellant was a woman of normal intelligence, but nevertheless suffered from a brain disfunction which was a result of a brain trauma. Although the exact cause of the terms could not be identified, he calculated the condition with a history of drinking and physical abuse. He testified that she tended to relate to others in a self-destructive manner. She

had experienced an early history of emotional abuse and lack of warmth. As a result, the Appellant was unable to sustain long relationships. She related to men primarily through physical sex. On the basis of his evaluation, de Socorrez further stated that Appellant "is unable to meet the needs of her children in regard to emotional warmth, caring and protection, protection in every sense of the word." The doctor's prognosis for Mrs. Gonzalez was "guarded". The prognosis for her learning to care appropriately for her children was nil. He did not believe that there was a program of psychotherapy, psychoanalysis or counseling which could provide the structure in which Mrs. Gonzalez could learn how to provide for her children adequately, emotionally and lovingly.

Mrs. Elias Salinas, a foster parent of Tomas, testified that when Tomas arrived at their home on April 15, 1976, he had lice, sores on his body and infected sores on his buttocks. Tomas was wearing dirty shorts and torn tennis shoes which did not fit. She stated that Tomas did not remember ever eating an egg. She described his health as improved: "being much better now." He had

gained weight and had "grown up", she said. She stated that Tomas calls her and her husband "Mamma" and "Daddy."

Esmeralda Rodriguez, a foster parent of Albert, testified that at the time Albert (10 years of age) arrived at their home, on April 15, 1976, he was slim and his stomach was protruding. She also stated that he had lice which took over three months to clear up by shampooing every day. She stated that he initially was somewhat uncoordinated, stumbled easily and had trouble in school; that he did not know his right hand from his left; and did not know the alphabet. She described him now as being much taller, healthy, and more conversant.

Bluford Bradford Hester,III, a child placement worker for the State, testified his duties included investigating reports of abuse and neglect, working with families which are having problems and working with foster children. He testified that he was assigned to the Gonzalez case in October, 1976. During his first visit with Mrs. Gonzalez, which occurred in October, 1976, Appellant informed him that she was living with a friend or relative because her

utilities were out at her home. Appellant showed Hester her accumulated utility bills which showed an overdue and unpaid amount of approximately $1,000.00. Hester stated that the basic utility bill had been in the neighborhood of $300.00 and $400.00 and that the remainder was due to finance charges imposed for non-payment. Hester stated that Appellant's utilities were turned on sometime in the spring of 1977 and remained on for approximately a year. In March, 1978, Hester stated that the utilities were again turned off due to non-payment and they remained off until sometime in May or the first part of June in 1978.

Hester testified that Appellant had no formal education, no prior job experiences and no special vocational job training. He described her most recent employment as that of a bar-maid at several different locations. It was undisputed that, prior to the time the children were removed, Appellant's sources of income were social security benefits that she and the surnamed Heath children received. She also received aid to families with dependent children for Tomas Gonzalez, Jr., plus food stamps, for

a total of approximately $500 to $600 per month. Mr. de Leon had paid her past due utility bill and provided some support payments for the children with the surname of de Leon. Appellant's home had been paid for from the proceeds of an insurance policy when her first husband died. The title to the house had been placed in the name of the Heath children. Hester testified that Appellant requested a visit with one of her sons who was in the South Texas State School in Edinburg and, at the same time, asked whether there would be any excess over his allowance for that particular month. He informed Appellant there probably would be an excess, but that it would take some five to six weeks for the necessary paperwork to be completed before she could receive such excess. He testified that she seemed disappointed at this response and subsequently cancelled her visitation trip.

There is ample probative evidence, both circumstantial and direct, to support the jury's findings as to each child. See Larson v. Ellison, 217 S.W.2d 420, 421 (Tex.Sup. 1949). Appellant's point of error number eight is overruled.

In addition to the evidence discussed above, we have reviewed the entire record and find that the jury's answers are not against the great weight and preponderance of the evidence. See In Re King's Estate, 244 S.W.2d 660 (Tex.Sup. 1951). There is ample evidence in the record from which the jury could reasonably conclude that Appellant knowingly placed or knowingly allowed all of the children to remain in conditions or surroundings which endanger their physical well-being. The jury is not only the judge of the facts, and circumstances proven, but they are the judge of the credibility of the witnesses. They are at liberty to draw reasonable inferences and deductions from the evidence adduced at trial. Lynch v. Ricketts, 314 S.W.2d 273 (Tex.Sup.1958); Clark v. Brewer, 498 S.W.2d 957, 959 (Tex.Civ.App.-Corpus Christi 1973, no writ). Appellant's point of error number nine is overruled.

In point of error number one, Appellant complaints that Section 15.02(1)(D) is void for vagueness and is unconstitutional on its face, and as applied to her. We have recently considered the precise same

contention that Section 15.02(1)(D) of the Texas Family Code is void for vagueness in Sanchez v. Texas Department of Human Resources, _____ S.W.2d _____ (Tex.Civ. App.-Corpus Christi 1979, no writ), and found that contention to be without merit. The record in this case does not support Appellant's contention that Section 15.02 (1)(D) is unconstitutional as it was applied to her. Appellant's point of error number one is overruled.

In points of error numbers six and seven, Appellant complains that the trial court erred by refusing to admit into evidence certain testimony of Remberto Arteaga, Supervisor of the Cameron County Child Welfare Unit of the Texas Department of Human Resources. After the State rested its case, counsel for Appellant recalled Mr. Arteaga and attempted to elicit certain testimony allegedly relevant to Appellant's "affirmative defense" that termination of the parent-child relationship was not the least drastic remedy available to the State. During the course of direct examination of Mr. Arteaga, the trial court refused to hear testimony by sustaining

relevancy objections to the following three areas of inquiry:

1. (Counsel for Appellant): "And I believe you testified earlier that these policies and procedures of the [State] are contained in the Social Service Manual, is that correct?

   (Arteaga): Yes.

   (Counsel for Appellant): Are you familiar with this manual?

   (Arteaga): Yes, ma'am.

   (Counsel for State): I am going to object to the constant reference to the material that pertains to the operations of the Department. I don't see the specific relevance to this case.

   (Court): Objection will be sustained.

   * * *

2. (Counsel for Appellant): [In light of the witnesses' previous testimony], can you tell me, speaking again for the [State], how serious a matter is removal of a child from its home?

   (Counsel for State): I object on the same basis, Your Honor, relevancy.

   (Court): Sustained. That is for the jury to decide.

   * * *

3. (Counsel for Appellant): Mr. Arteaga, how many other cases have you been involved in where termination is sought?

   (Counsel for State): We'll object to that on the same basis, relevancy:

   (Court): Sustained."

The trial judge granted Appellant's request to make a formal bill of exceptions concerning the excluded testimony.

The formal bill of exceptions, including exhibits attached thereto, comprises 74 pages in the supplemental transcript. Nowhere in the bill of exceptions is evidence concerning the areas of inquiry two and three above. Most of the substance of Mr. Arteaga's testimony contained in the bill of exceptions is a summary of his own prior testimony or a summary of other witnesses' prior testimony which had been introduced into evidence without objection. The bill of exceptions does contain the following statements which Appellant did not specifically attempt to introduce through Arteaga's testimony during the trial: 1) the family of Appellant, "at all times pertinent hereto, [was] experiencing a 'protective situation' as

that term is used throughout the Social Services Handbook;" 2) Appellant "and her family were at all pertinent times hereto qualified for the services available through Cameron County Child Welfare Unit to families experiencing protective situations;" and 3) the Cameron County Child Welfare Unit was able to provide eight enumerated services to families experiencing "protective situations." Attached to the bill of exceptions as exhibits were copies of: 1) "various pertinent sections of the 'Social Services Handbook' as those sections existed from and after the date shown on each page;" and 2) "copies of Article 695c §18A(1), V.A.T.S.; 42 U.S.C. §§601, 602 (a), 622(a); 45 C.F.R. §§220.1-220.40, [which would have been offered into evidence]." These exhibits comprise 71 pages of the bill of exceptions.

As a general rule, error is not shown in the exclusion of evidence unless the Appellant brings before the appellate court a record that shows clearly not only what the evidence would have been if admitted, but also its relevancy. Kieffer v. Miller, 560 S.W.2d 431 (Tex.Civ.App.-Beaumont 1977,

writ ref'd n.r.e.); Swinney v. Winters, 532 S.W.2d 396 (Tex.Civ.App.--San Antonio 1975, writ ref'd n.r.e.); Victoria Comfort Air Co. v. Alamo Express, 529 S.W.2d 250 (Tex.Civ. App.--Corpus Christi 1975, no writ). The complaining party has the burden to show reversible error by demonstrating that the exclusion of evidence was reasonably calculated to and probably did cause the rendition of an improper verdict or judgment. Gomez Leon v.State, 426 S.W.2d 562 (Tex.Sup. 1968); Ryder Tank Lines Inc. v. Bentley, 397 S.W.2d 914 (Tex.Civ.App.--Fort Worth 1965, writ ref'd n.r.e.). Reversible error is not present where the substance of the excluded testimony is cumulative or has been previously introduced through that witness or another witness. Brazos Graphics, Inc. v. Irvin Industries Inc., 22 Tex.Sup. 309 (Tex.Sup. April 18, 1979); Hopkins v. Clark, 20 Tex. 64 (Tex.Sup.1857); Yancy v. Olvera, 518 S.W.2d 935 (Tex.Civ.App.--San Antonio 1974, writ ref'd n.r.e.); Sanchez v. Billings, 481 S.W.2d 911 (Tex.Civ.App.-Houston [14th Dist.] 1972, writ ref'd n.r.e.); Parten v. Wilson, 243 S.W.2d 198 (Tex.Civ.App.--Beaumont 1951, writ ref'd n.r.e.).

Error is not shown by the exclusion of evidence which previously had been introduced. The remainder of Arteaga's testimony and the Handbook (Exhibit "A") contained in the bill of exceptions is of such a general nature that we fail to see its relevancy. No effort has been made to tie Arteaga's testimony with any specific sections of the attached Handbook, nor to any of the other attached exhibits. We conclude that Appellant has failed to show that the exclusion of this evidence was error or if we could say that it was error, Appellant has failed to demonstrate that such error was reasonably calculated to and probably did cause the rendition of an improper judgment in this case. Rule 434, T.R.C.P. Appellant's points of error numbers six and seven are overruled.

The judgment of the trial court is AFFIRMED.

PAUL W. NYE
Chief Justice

Opinion delivered and filed this, the 3rd day of May, 1979.

COURT OF CIVIL APPEALS
Thirteenth Supreme Judicial District
Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Civil Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the 3rd day of May, 1979. If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 1428 (Trial Court No. 3076-N-T)

GUADALUPE H. GONZALEZ,

Appellant,

v.

TEXAS DEPARTMENT OF HUMAN RESOURCES,

Appellee.

on appeal to this Court from Cameron County, Texas.

* * * * * * * *

JUDGMENT

On appeal from the 197th District Court of Cameron County, Texas. Opinion by Chief Justice Paul W. Nye.

THIS CAUSE was submitted to the Court on January 18, 1979, on oral argument, briefs and transcript of the record. These having been examined and fully considered, it is the opinion of the Court that there is no error in the judgment of the court below and said judgment is hereby AFFIRMED.

It is further ordered that Appellant GUADALUPE H. GONZALEZ pay all costs of this appeal expended and incurred. It is further ordered that this decision be certified below for observance.

* * * * * * * * * *

Shirley Selz, Clerk

APPENDIX C

IN THE SUPREME COURT OF TEXAS

AUSTIN

NO. B-8601 September 12, 1979

GUADALUPE H. GONZALEZ		
VS.		From Cameron County,
TEXAS DEPARTMENT OF HUMAN RESOURCES		Thirteenth District

Application of petitioner for writ of error to the Court of Civil Appeals for the Thirteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Guadalupe H. Gonzalez, pay all costs

incurred on this application.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 3rd day of October, 1979.

GARSON R. JACKSON, Clerk

BY: Mary M. Wakefield, Deputy

APPENDIX D

§15.02 Involuntary Termination of Parental Rights

A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another not the parent and, although expressing an intent to return, failed to do so without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or

surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code· and in addition, the court further finds that

(2) termination is in the best interest of the child. Amended by Acts 1975, 64th Leg., p. 1266, ch. 476, §31, eff. Sept. 1, 1975.

Supreme Court, U. S.
FILED
JAN 31 1980
MICHAEL RODAK, JR., CLERK

NO. 79-913

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * * * *

GUADALUPE H. GONZALEZ

Petitioner

VS.

TEXAS DEPARTMENT OF HUMAN RESOURCES

Respondent

* * * * *

RESPONDENT'S ANSWER TO APPLICATION FOR WRIT OF CERTIORARI

* * * * *

JOE K. HENDLEY
ASSISTANT CRIMINAL DISTRICT ATTORNEY
CAMERON COUNTY, TEXAS
974 EAST HARRISON
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ATTORNEY FOR THE RESPONDENT

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STATEMENT OF THE COUNTER-ISSUES

COUNTER-ISSUE NUMBER ONE (in response to Petitioners Question Number One)

Section 15.02(1)(D) of the Texas Family Code is not unconstitutionally vague on its face, nor is it unconstitutionally applied to the Petitioner.

COUNTER-ISSUE NUMBER TWO (in response to Petitioners Question Number Two)

The State of Texas exhibited threshold harm necessary to give the State a compelling interest sufficient to justify permanent termination of the parent-child relationship.

STATEMENT OF THE CASE

This is a case in which the Texas Department of Human Resources, Petitioner and Temporary Managing Conservator, instituted suit to terminate the Parent-child relationship between the Appellant, Guadalupe H. Gonzalez, and five of her children. The cause was filed in the District Court of Cameron County, 197th Judicial District, the Honorable Darrell B. Hester, presiding.

The Appellant appeared in person and by and through her Attorney of Record, the Honorable James Belton and the Honorable Susan Williams of the Texas Rural Legal Aid Inc.

Rolando Heath, father of the children surnamed Heath, died in 1967.

Tomas Gonzalez, Sr., father of Tomas Gonzalez, Jr., executed an affidavit of waiver of interest in the child and an affidavit of relinquishment of parental

rights. He also waived citation and service of process. Tomas Gonzalez failed to appear and wholly defaulted.

Leonzo de Leon, biological father of the children surnamed de Leon, although duly served with service of process and notification of the hearing, failed to appear and wholly defaulted.

The Honorable E. Dale Robertson appeared as Attorney ad Litem to represent the interests of all the children.

The caused was duly tried before a jury, which found through the submission of special issues that:

(1) Mrs. Gonzalez had knowingly placed all the children subject to the suit in conditions or surroundings which endangered their physical well-being.

(2) Mrs. Gonzalez had knowingly allowed all the children subject to the suit to remain in conditions or surroundings which endangered their physical well-being.

(3) Termination of the parent-child relationship between Mrs. Gonzalez and each of the children was in the best interest of each child.

(4) Appointment of the Cameron County Child Welfare Unit as Managing Conservator of each child would be in the best interest of each.

Judgment was rendered in accordance with the Jury findings.

Mrs. Gonzalez appealed to the Court of Appeals for the Thirteenth Supreme Judicial District. Chief Justice Paul Nye wrote the opinion of the Court (Gonzalez v. State Department of Human Resources, 581 S.W.2nd 522. (Tex.Civ.App.-Corpus Christi. 1979) affirming the Judgment on all points.

Mrs. Gonzalez then filed an application for Writ of Error in the Texas Supreme Court. The writ was refused when the Court found no reversible error.

STATEMENT OF THE FACTS

The facts as put forth in Chief Justice Nye's opinion are correct and need not be repeated here.

ARGUMENT AND AUTHORITIES REGARDING COUNTER-ISSUE NUMBER ONE

COUNTER-ISSUE NUMBER ONE (in response to Petitioners Question Number One)

> Section 15.02 (1)(D) of the Texas Family Code is not unconstitutionally vague on its face.

Petitioner's attack on the constitutionality of the Statute turns on the issue of vagueness.

Mrs. Gonzalez relies heavily on the case of Alsager v.District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D.Ia. 1975), aff'd 545 F2d 1137 (8th Cir. 1976). As pointed out by Chief Justice Paul W. Nye in his opinion in the case of Sanchez v. Texas Department of Human Resources, 581 S.W.2d 260 (Tex.Civ.App.-Corpus Christi, 1979 no writ).

> ...(A) careful reading of the opinion of the Eighth Circuit panel in affirming the case reveals that the appeals court expressly declined to affirm the District Court's opinion on the basis of the 'vagueness and over-

> breadth attacks upon facial validity' of the statute." Page 11.

Specifically the Alsager Court said:

> Although we decline to resolve whether the statutory provisions cited above are facially unconstitutional, as alternatively held by the District Court, we cannot refrain from noting, at minimum, that both the vagueness and overbreadth attacks upon these provisions are serious ones. By declining to affirm on these grounds, however, we afford the Iowa courts an additional opportunity to give the statutory provisions a plainly desirable limiting construction. See Grayned v. City of Rockford, 408 U.S. 104, 111-112, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972) (vagueness), and Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973) (overbreadth). Given the obvious comity concerns at issue, we view such disposition as the one most appropriate. Page 1138.

The constitutionality of Section 15.02 has developed a history of support in the Texas Appellate Courts. Sanchez v. Texas Department of Human Resources, 581 S.W.2d 260 (Tex.Civ.App.-Corpus Christi, 1979, no writ); Crawford v. Crawford, 569 S.W.2d 505 (Tex.Civ.App.-San Antonio, 1978, no writ); Lane v. Jefferson County Child Wel-

fare Unit, 564 S.W.2d 130 (Tex.Civ.App.-Beaumont, 1978, writ ref'd n.r.e.); McGowan v. State, 558 S.W.2d 561 (Tex.Civ.App.-Houston [1st District] 1975, no writ).

Additionally, statutes of other jurisdictions have passed constitutional muster.

Oregon Revised Statute 419.523 states in part:

> (2) The rights of the parent or parents may be terminated in Subsection (1) of this Section if the Court finds the parent or parents:
>
> (a) are unfit by reason of conduct or condition seriously detrimental to the child.

The Oregon Supreme Court found the Statute was not void for vagueness in State v. McMaster, 486 P.2d 567 (Ore.Sup. Ct. 1971).

The South Dakota Statute (S.D.C.L. 28-8-6) states in part:

> "Neglected or dependent child defined. In this chapter unless the context otherwise plainly requires 'neglected or dependent

> child' means a child: whose parent, guardian, or custodian has abandoned him or has subject him to mistreatment or abuse; who lacks proper parental care through the actions of omissions of the parent, guardian, or custodian; whose environment is injurious to his welfare; whose parent, guardian, or custodian fails or refuses to provide proper or necessary subsistence, education, medical care or any other care necessary for his health, guidance, or well-being; or who is homeless, without proper care, or not domiciled with his parent, guardian, or custodian through no fault of his parent, guardian or custodian. Provided however, notwithstanding any other provision of this chapter, no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to have been neglected within the purview of this chapter."

The South Dakota Supreme Court held the Statute was not void for vagueness. See Matter of D.T., 237 N.W.2d 166

(S.D.Sup.Ct. 1975) and Matter of SJZ, 252 N.W.2d 224, (S.D.Sup.Ct. 1976).

The Maryland termination Statute (Article 26, Subsection 52(f) defines the neglected child as one:

> (1) who is without proper guardianship;
> (2) whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity, is unfit to care properly for such a child;
> (3) who is under unlawful or improper care, supervision, custody or restraint, by any person, corporation, agency, association, institution or other organization or who is unlawfully kept out of school;
> (4) whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child;
> (5) who is in such condition of want or suffering or is under such improper guardianship or control, or is engaged in such occupation as to injure or endanger the morals or health or other;
> (6) who is living in a home

> which fails to provide a stable moral environment.

The statute was not found to be void for vagueness in the case of In Re Cager, 248 A2d 384 (Md.App. 1968). Also see In Re Trader, 325 A2d 398, 411 (Md.App. 1974) and Matter of Grant, 264 N.W.2d 587, 592 (Wis.Sup.Ct. 1978).

Counsel for Mrs. Gonzalez directs the Court's attention to instances (Arkansas and Alabama) where involuntary termination of parental rights statutes were found impermissably vague. (Roe v. Conn, 417 F.Supp. 769 (M.D.Ala. 1976) and Davis v. Smith, 583 S.W.2d 37 [Ark.Sup.Ct. 1979]).

The Texas Statute under examination here does not resemble either Statute in Roe or Davis.

In Davis, Arkansas permitted adoption without the consent of parents if:

> the parents....are unable to provide a proper home for the children...." (Ark.Stats. §56-128(2)(h) (Supp. 1977)

Discussing the case, the Court said:

> Before discussing the reasons for our disposition of this case, there are matters pertaining to the record and the proceedings that should be stated to avoid misunderstandings as to the effect of our holding. There was no appeal from the juvenile court order by which Arkansas social Services was given custody of these children and that order is not under review here. The allegations of the petition for guardianship charging appellants with unfitness because of abandonment, depravity and desertion were abandoned by the petitioner just at the outset of the hearing and the petitioner elected to rely upon his allegation that appointment of a guardian with authority to consent to adoption was sought because the parents are unfit to properly care for the children and will not be able to care for them. When this election was made, petitioner's attorney stated that reliance was placed upon Ark.Stat.Ann. §56-128(2)(h). The probate court's order was based upon its finding that 'the parents are not fit and competent to have custody and control of said children and are unable to provide a proper home for the children as set out in Ark.Stat.Ann. §56-128(2)(h).' In orally stating his findings, the probate judge concluded

> that, based upon the evidence, the parents have failed to provide a proper home for the children." Page 39-40.

The Arkansas Supreme Court, before passing on the issue of constitutionality of the statute recognized; 1) Parental rights and the integrity of the family unit as a civil and personal right more precious than property rights; 2) Parental rights are not, beyond limitation in the public interest; 3) the State's constitutional interest extends to the welfare of the child; and 4) Parental rights are not immune from interference by the State in the role of parens patriae. The Court then set forth some of the standards it considered in arriving at its holding.

> Mathematical certainty in language is not to be expected in any statute. Grayned v. City of Rockford, supra. See also, Robinson v. United States, 324 U.S. 282, 65 S.Ct. 666, 89 L.Ed. 944 (1945). Flexibility and reasonable breadth, rather than meticulous specificity or great exactitude, in a statute are

permissible, so long as its reach is clearly delineated in words of common understanding. Grayned v. City of Rockford, supra; Minor Children of F.B. v. Caruthers, 323 S.W.2d 397 (Mo.App., 1959). A statute which defines boundaries sufficiently distinct for citizens, policemen, juries and appellate judges is not impermissibly vague. Grayned v. City of Rockford, supra. Impossible standards of specificity are not required by the constitution, even in criminal statutes, and a statute meets constitutional muster, if the language used conveys sufficient warning when measured by common understanding and practice. Jordan v. DeGeorge, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951); United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947). It is not necessary that all kinds of conduct falling within the reach of the statute be particularized. City of Chicago v. Fort, 45 Ill.2d 12, 262 N.E.2d 473 (1970). A statute is not to be struck down as vague only because marginal cases could be put where doubles might arise. United States v. Harris, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954). The futility of anticipating and enumerating every means or method a fertile mind might devise that would come within the purview of a statute is obvious. City of

Chicago v. Fort, supra; Minor Children of F.B. v. Caruthers, supra.

The problem with the Arkansas statute was use of the term "proper home." The court complained such an expression was open to multiple meanings.

Ultimately the Court held:

> We deem the statutory provision in question to leave the discretion vested in judges so broad that arbitrary and discriminatory parental terminations are inevitable. Cf. Alsager v. District Court of Polk County, supra. Since we find Ark.Stat. Ann. §56-128(2)(h) too vague to meet due process requirements of both the state and federal constitutions, and the petition and judgment totally dependent on that provision, appellees having elected to stand on that provision only, we must not only reverse the judgment but also dismiss the petition. (emphasis added). Page 41.

The Texas Statute involved in the instant case would withstand the analysis in Davis.

Roe involved the summary seizure of children and in that sense would be

parallel to Chapters 11 and 17 of the Texas Family Code. (Involuntary termination is set forth in Chapter 15 of the Texas Family Code).

Alabama Code Title 13 §350(2) reads in part:

> The words 'neglected child' shall mean any child, who, while under sixteen years of age has no proper parental care or guardianship or whose home, by reason of neglect, cruelty, or depravity, on the part of his parent or parents, guardian or other person in whose case he may be, is an unfit and improper place for such child or is under proper or insufficient guardianship or control as to endanger the morals, health or general welfare of such child or who for any other cause is in need of the care and protection of the State."

The Alabama Trial Court based his ruling on the simple fact that: "it is not a healthy thing for a white child to be the only [white] child in a black neighborhood." (Page 775).

The case presently before the Court

is not one of summary seizure and is therefore clearly distinguishable from Roe. The Court in Roe quotes Alsager and Grayned v. City of Rockford, 408 U.S. 104 (1972). The Roe Court follows a similar "void for vagueness" analysis as set forth by other State and Federal Courts.

The Texas Statute requires a dual finding. 1) That the person/parent knowingly engaged in prohibited conduct and 2) that termination is in the child's best interest.

The determination under subsection 1 requires the finder of fact to determine two seperate things. a) The party engaged in conduct which endangered the child and b) the party acted knowingly; knowingly is defined in the Texas Penal Code §6.03(b):

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A per-

son acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

It is apparent the statute clearly sets out the nature of the prohibited conduct, the culpable mental state and is not impermissibly vague.

ARGUMENT AND AUTHORITIES REGARDING COUNTER-ISSUE NUMBER TWO

COUNTER-ISSUE NUMBER TWO (in response to Petitioners Question Number One)

> The State of Texas exhibited threshold harm to give the State a compelling interest sufficient to justify permanent termination of the parentchild relationship.

Mrs. Gonzalez would have this Court believe the State refused or failed to provide some rehabilitative service, thereby essentially refusing to re-unite her family. This is a factual argument unsupported by the record.

The State of Texas readily conceeds the fundamental nature of the rights

involved in the family unit. The integrity of unit and the privacy it deserves are of utmost importance. It is the consistent policy of this State to intrude into the family unit under only the most dire situations.

In 1977, a three Judge Federal panel in Houston, Texas declared huge sections of the Texas Family Code unconstitutional (Sims v. The Department of Public Welfare of State of Texas, 438 F.Supp 1179 [S.D.Tx. 1977]).

The Department of Human Resources (formerly Department of Public Welfare) initiated a series of policy changes and operational reforms so as to immediately comply with the order entered in Sims.

However, in 1979, this Court considered Moore v. Sims, _____U.S._____, 99 S.Ct. 2371 (1979) and reversed and remanded the case based on Younger v. Harris, 401

U.S. 37 (1971) and Hoffman v. Pursue, Ltd., 420 U.S. 592 (1975).

One cannot attribute motives to the Texas Legislature. Nevertheless, during the 1979 session, the legislature re-wrote large sections of Title 2 of the Texas Family Code. Only Chapter 16, dealing with adoption, was left untouched. Chapter 17, Emergency Procedures in Suit by Governmental Entity was re-written and Chapter 18, Review of Placement of Children Under the Care of the Department of Human Resources was added.

The Texas Legislature demonstrated its sensitivity to the conflict of rights in suits effecting the parent-child relationship.

The rights of the parents, particularly with regard to procedural due process, were strengthened and expanded.

It should be noted that despite this demonstrated concern, sensitivity and legislative effort, the lawmakers did not see fit to modify or change §15.02(1)(D) which is under attack here.

CONCLUSION AND PRAYER

Considering the foregoing, Respondent (Appellee in the Court below) prays this Honorable Court refuse the Application for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the following Brief for Appellee has been posted in the United States Postal Service, Certified Return Receipt Requested on this the ____ day of _____, 1980 to: James E. Belton, Attorney at Law, Texas Rural Legal Aid, Inc., 1154 East Elizabeth Street, Brownsville, Texas 78520; Susan Williams, Attorney at Law, Texas Rural Legal Aid, Inc., 103 East Third, Weslaco, Texas, 78596; and E. Dale Robertson, Attorney ad Litem, 950 East Van Buren, Brownsville, Texas, 78520.

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